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Supreme Court of the United States

OCTOBER TERM 1978

No. 79-145

THE STATE OF CALIFORNIA,

Petitioner,

v.

PAUL MICHAEL MINJARES,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA SUPREME COURT

GEORGE DEUKMEJIAN,
Attorney General
ROBERT H. PHILIBOSIAN, Chief Assistant
Attorney General
DANIEL J. KREMER,
Assistant Attorney General
ALAN S. METH,
Deputy Attorney General
PATRICIA D. BENKE,
Deputy Attorney General

110 West "A" Street, Suite 600
San Diego, California 92101
Telephone: (714) 237-7750

Attorneys for Respondent

INTERIM PRINTING & MAILING COMPANY
1105 WEST MORENA BOULEVARD, SAN DIEGO, CALIFORNIA 92110 — 275-3050

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IN THE SUPREME COURT OF THE UNITED STATES

October Term 1978

No. _____

THE STATE OF CALIFORNIA,

Petitioner,

v.

PAUL MICHAEL MINJARES,

Respondent.

PETITION FOR WRIT OF CERTIORARI

Petitioner, the State of California, respectfully prays that a Writ of Certiorari be issued to review the judgment and opinion of the California Supreme Court entered in this proceeding May 25, 1979, reversing a judgment finding respondent guilty of two counts of armed robbery of the first degree in violation of California Penal Code, sections 211 and 12022.5.

OPINIONS BELOW

The opinion for the California Supreme Court is reported as People v. Minjares (1979) __ Cal.3d ___, Crim. 20549, slip opinion May 25, 1979. A copy of that opinion appears as Appendix A to this petition. The order of the California Supreme Court issued June 27, 1979, refusing

to grant a rehearing in this case appears as Appendix B to this petition.

JURISDICTION

Petitioner invokes the jurisdiction of this Court under Title 28, United States Code, section 1257(3) to review a judgment of the California Supreme Court, which was entered on May 25, 1979. The California Supreme Court denied a rehearing in this case on June 27, 1979. The present petition for Writ of Certiorari is filed within 90 days of both the filing of the opinion of the California Supreme Court and the denial of a rehearing by the California Supreme Court. Thus, the instant judgment is a final decision rendered by the highest court of the State of California interpreting rights under the United States Constitution. (Chicago G.W.R. Co. v. Basham (1919) 249 U.S. 164, 167; Market Street R. Co. v. Comm'n (1944) 324 U.S. 548, 550-552.)

QUESTIONS PRESENTED

1. Should the warrantless search of luggage in a getaway automobile be permitted where at the time of the search police are still in pursuit of a missing suspect, loot and firearms used during a crime?

2. Should United States v. Chadwick, be applied retroactively to crimes which occurred before that decision?

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment IV:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

United State Constitution, Amentment XIV, in relevant part:

> "SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATUTES INVOLVED

California Penal Code section 211:

"Robbery is the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear."

California Penal Code, section 1538.5 in relevant part:

"(a) A defendant may move for the return of property or to suppress as evidence any tangible or intangible thing obtained as a result of a search or seizure on either of the following grounds:

"(1) The search or seizure without a warrant was unreasonable.

" . . . . . .

"(h) If, prior to the trial of a felony or misdemeanor, opportunity for this motion did not exist or the defendant was not aware of the grounds for the motion, the defendant shall have the right to make this motion during the course of trial in the municipal, justice or superior court."

California Penal Code, section 12022.5 in relevant part:

"Any person who personally uses a firearm in the commission or attempted commission of a felony shall, upon conviction of such felony or attempted felony, in addition and consecutive to the punishment prescribed for the felony or attempted felony of which he has been convicted, be

punished by an additional term of two years, unless use of a firearm is an element of the offense of which he was convicted. . . ."

STATEMENT OF THE CASE

A. STATEMENT OF THE PROCEEDINGS

On April 19, 1976, the District Attorney for Alameda County charged respondent with two counts of armed robbery in violation of California Penal Code section 211. Prior to and during trial, respondent brought motions to suppress evidence obtained during a search of a tote bag found in the trunk of his automobile. The motions were denied by the trial court.

On May 4, 1976, respondent was found guilty by a jury of two counts of first degree robbery. It was also found he used a handgun during the commission of the offenses. He was sentenced to state prison, the terms to run consecutively.

The California Court of Appeal, First Appellate District, Division Two, upheld the trial court's denial of respondent's suppression motion and affirmed the judgment of conviction in a published opinion filed April 17, 1978. The Court of Appeal found United States v. Chadwick (1977) 433 U.S. 1 inapplicable. It also found the search took place during hot pursuit. (A copy of the opinion of the Court of Appeal is attached hereto as Exhibit C.

A hearing was granted by the California Supreme Court. On May 25, 1979, by a divided court, it reversed the conviction, holding United States v. Chadwick, supra, applies to the facts of

this case and renders the tote bag search invalid.

Petitioner's request for a rehearing was denied by the California Supreme Court on June 27, 1979. (See Appendix B.)

Petitioner's motion to stay issuance of the remittitur in this case pending action by the United States Supreme Court on this petition for Writ of Certiorari was also denied on June 27, 1979. (See Appendix D.)

B. STATEMENT OF FACTS ADDUCED AT THE MOTION TO SUPPRESS EVIDENCE

On December 19, 1975, at approximately 8:50 p.m.,1/ the Fremont Safeway Store was robbed by two individuals armed with handguns. A witness to the robbery followed the two men out of the store and saw them get into an automobile. The witness followed the car for 5 to 10 minutes, about 5 miles. He determined the car was a 1968 or 1969 Ford Fairlane. When he got close enough to note the license number, 075 ALC, he went directly to the police department and reported what he had seen. (RST 48-56.)2/

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1. This was the time indicated at the motion to suppress hearing. (RST 48.) It differs from the time indicated in the opinion of the California Supreme Court and that stated in petitioner's request for a stay.

2. "RST" refers to the Reporter's Supplemental Transcript of the pretrial motion to suppress evidence, which was included as part of the record before the California Supreme Court.

(continued next page)

At approximately 8:50 p.m., Fremont police officer William Bone broadcast the description of the suspect's vehicle and license number. At that time, the Fremont Police Department invoked S.N.A.R.E., a tri-city "lookout" procedure. Officers involved in this program took their posts. (RST 5-7, 46.)

Fremont police officer William Perry heard the broadcast and took his position on Highway 680, 6 to 8 miles from the scene of the robbery. About 9:10 p.m., twenty minutes after the robbery broadcast, Officer Perry saw a car matching the suspect vehicle, with the license number ALC 075, going north on Highway 680. He requested cover units, then stopped the vehicle. (RST 12-15, 17, 20.)

Once the vehicle was stopped, respondent, the driver, was ordered from the car, searched and advised he was under arrest for robbery. He was the only person in the vehicle and he fit the physical description of one of the suspects. Nothing on his person connected him with the robbery. (RST 15.)

The automobile was then searched. The reasons for doing so were articulated by the officer who stopped the vehicle:

"Q. And why was the decision made

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2. (continued from page 6)

"RT" refers to the Reporter's Transcript of the motion to suppress evidence held pursuant to California Penal Code section 1538.5(h) and which was included as part of the record before the California Supreme Court.

to search the passenger compartment of the vehicle out on the road at that time?

"A. For evidence of the robbery, the weapons, clothing, anything that might indicate the second suspect, loss.

"Q. All right. You also had in mind possible identification as to the other persons involved in the robbery?

"MR. PACE: Objection as leading, Your Honor.

"THE COURT: Yes, he's already responded to that. The information leading to the second suspect or something similar, words that he used, it was leading. Sustained. Already asked and answered." (RT 366.)

"Q. After searching the passenger compartment of the car, was there anything found in that passenger compartment which was evidence of the crime which had occurred?

"A. No.

"Q. Was there a discussion concerning the search of the -- the possible search of that vehicle out -- while you were out on Highway 680 after the search of the passenger compartment?

"A. Yes.

"Q. And who was that discussion among or between?

"A. Officer Perry, Sergeant Ehlen and myself.

"Q. And Sergeant Ehlen arrived out at the scene of the car stop by then? A. Yes.

"Q. And was there a decision made to attempt to open the trunk at that time?

"A. Well, an attempt was made in that Perry requested the key from Minjares to the trunk. That's as far as the attempt went.

"Q. A decision then had been made to open the trunk if there was a key available at that time?

"A. Yes.

"Q. And why had the decision been made to go into the trunk compartment of the car?

"A. Well, I think primarily again looking for evidence of the crime and we were missing a second suspect." (RT 366-367.)3/

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3. The opinion of the California Supreme Court concludes there is no evidence the police wished to search the trunk or its contents for evidence leading to the second suspect. (Slip opinion, p. 6, fn. 3.) However, as was pointed out at argument and in petitioner's request for a rehearing, this is not a correct statement of the testimony in this case.

He later testified:

"Q. Now, let me ask you this: While you were making the decision to search the car and the trunk, did you ever make a decision to obtain a search warrant?

"A. I considered a search warrant and decided against it.

"Q. And what were the reasons you considered against getting a search warrant at that time?

"A. Basically, I think, time. In other words, by searching without the search warrant, we would save a matter of hours.

"Q. And why was time a factor at this stage in the occurrence?

"A. Well, we were still looking for a second suspect.

"Q. Was there a network or an operation in process that's referred to as Snare in the Fremont area? A. Yes, there was." (RT 368.)

The police also wished to search the trunk to determine if the second suspect was hiding there. (RST 37, 41, 45; RT 350, 355.)

The officers, who knew the suspects were armed during the robbery, decided the vehicle should be towed to a corporation yard where it would be off the highway and in better light. At that time they considered the automobile a piece of evidence. (RST 17; RT 365, 368.)

Fifteen to twenty minutes after the stop, the automobile was towed to the corporation yard eight to ten miles away. (RST 17, 21, 24; RT 350.)

At the corporation yard, two armored vests were draped over the vehicle's trunk. An officer, with gun drawn, stood by as precautions were taken in the event an armed individual was found inside. Within thirty seconds the lock was picked and the trunk opened. No suspect was found inside. However, a bulging tote bag was found in the middle, not more than a foot into, the trunk. (RST 31-33.)

Inside the tote bag, police found a number of guns and clothing matching the description of that worn by the suspects. (RT 229-235, 253-254.)

THE TRIAL COURT'S RULING

The trial court denied respondent's motion to suppress the evidence seized during the search of the tote bag. (RT 385-386; RST 66-67.)

In so ruling, the court stated:

"THE COURT: Be denied. I do that because it's overwhelming. I'm not going to go through all the facts, but the articulable facts, they were looking for clothing, for indicia that might lead them to the other defendant. They were looking for the guns that might have been used, they were looking for the cash, they knew that there had been, this car had sped away from the scene at a high rate. They knew there was this second person. I'm not going to go in and I'm

not by this trying to enumerate all the items, but just in quick response, without even looking at my notes." (RT 386-387.)

REASONS WHY CERTIORARI SHOULD BE GRANTED

I

IN THOSE CASES WHERE POLICE ARE FACED WITH THE EXIGENCY OF PURSUING FLEEING SUSPECTS, LOOT AND EVIDENCE OF A CRIME, THE CALIFORNIA SUPREME COURT HAS IMPROPERLY APPLIED THE SEARCH INCIDENT TO ARREST STANDARD OF UNITED STATES v. CHADWICK, AND AS A RESULT, HAS ACCORDED LUGGAGE IN AUTOMOBILES GREATER PRIVACY THAN LUGGAGE IN RESIDENCES

A. The California Supreme Court Has Incorrectly Determined United States v. Chadwick Controls This Case

This Court has held that in the absence of special exigencies the automobile exception to the warrant requirement does not extend to personal luggage found inside automobiles. (United States v. Chadwick (1977) 433 U.S. 1, 13, 15, fn. 9; Arkansas v. Sanders (June 20, 1979) 47 U.S.L.Week 4783.

By its opinion the California Supreme Court holds the Chadwick case precludes the warrantless search of luggage found in a getaway vehicle, even though police are still in organized search of a missing suspect and missing evidence of the crime, including firearms and stolen money.

The rationale of the California Supreme Court is that:

> "While an automobile in police custody may conceivably be moved or broken into, the tote bag could have been held quite secure until a warrant was obtained. Whatever delay the obtaining of a search warrant might have entailed, it would not have resulted in the loss or destruction of any evidence that might have been in the tote bag." (People v. Minjares, slip opinion, p. 9.)

This reasoning works well in situations like United States v. Chadwick, supra, 433 U.S. 1, 13, and the more recent decision of Sanders, supra, 47 U.S.L.Week 4783. In Chadwick and Sanders, the police had probable cause to believe a particular piece of luggage contained contraband. In both cases, this probable cause existed before the luggage was placed in a car. This case, however, is significantly different from Chadwick, and Sanders. Neither of those cases involved police engaged in fresh pursuit of missing suspects, loot and firearms. Here, prior to searching the tote bag police knew a second, possibly armed suspect was still at large. They also knew the money stolen in the robbery was missing, as were the guns used to commit the crime. Because the robbery had occurred shortly before respondent's automobile was stopped, there was probable cause to believe the tote bag might hold some of the missing objects of their pursuit, or evidence which would lead them to those objects. However, the police

had absolutely no way of knowing what, if anything, would be found in the tote bag. It might contain the guns, loot and name and address of the second suspect, or it might contain nothing. The only way to tell was to look and a delay in looking while a warrant was obtained would probably have cost "hours." (RT 368.) If evidence was then found in it which could lead to the missing suspect or loot, it might be too late to use it. If it was found to be empty, valuable time and resources would have been wasted while the second suspect, loot and other evidence were far beyond reach.

Under such circumstances, a rationale which requires police hold the tote bag and await a warrant is simply unreasonable and does not take into account the practical difficulties facing police who are pursuing fleeing suspects who may be armed and carrying stolen loot.

This Court has not had occasion to rule on the validity of a warrantless search of luggage contained in an automobile where, as here, police in the field are engaged in a search for a missing suspect, loot and firearms, and are confronted with an automobile which may or may not contain the objects of their search. (See Arkansas v. Sanders (June 20, 1979) 47 U.S.L.Week 4783, 4787 (concurring opinion of Chief Justice Burger, Mr. Justice Stevens).

Under the circumstances presented here, the tote bag search was proper. The rationale of United States v. Chadwick, supra, 433 U.S. 1, should not control this case.

B. The California Supreme Court Erred In Determining There Was No Exigency In This Case

The testimony at the suppression motions and ruling of the trial court clearly reflect the police searched respondent's automobile and tote bag in order to find evidence which could help in the still ongoing pursuit of the second suspect, and retrieval of the loot and firearms. At the time of the tote bag search, the police were still organized in the tri-city SNARE operation, and had no way of knowing if the automobile or tote bag contained any of the objects of their search. (RT 350, 355, 366-368.) Indeed, the trial court determined the search of the tote bag was conducted in order to expedite pursuit. It expressly found there was "overwhelming " evidence that the time police searched the tote bag, they were involved in an ongoing search and were looking for evidence which would lead them to the second, missing suspect, the guns that might have been used, and the stolen cash. (RT 386.) Similarly, the District Court of Appeal held the automobile was stopped during "hot pursuit" and at a time when such a search might reasonably provide evidence of the crime or the fruits of the robbery. (Court of Appeal opinion (Exh. C) attached hereto, pp. 9-10.)

The opinion of the California Supreme Court itself clearly shows that at the time police stopped respondent's automobile and made contact with him, they knew the second, possibly armed, suspect was still at large and that the cash taken in the robbery, and guns used in the robbery were also missing. The opinion very clearly reflects the police searched the automobile for this second suspect and

evidence of the crime. (People v. Minjares, supra, slip opinion, pp. 1-2, 5-6.)

Nevertheless, the California Supreme Court concludes there was no exigency which would have allowed the warrantless search of the tote bag, because, once having secured the tote bag, no evidence in it would have been lost or destroyed. (People v. Minjares, supra, slip opinion, p. 9.) It is respectfully urged the California Supreme Court is incorrect and its conclusion is contrary to the opinions of this Court.

Both "hot pursuit" which involves "some kind of chase," and the need to act have been defined as exigent circumstances by this Court. (Michigan v. Tyler (1978) 436 U.S. 499, 509; United States v. Santana (1975) 427 U.S. 38, 43; n. 3; Warden v. Hayden (1966) 387 U.S. 294, 298-299.)

In its opinion, the California Supreme Court did not expressly state hot pursuit was not involved. It simply ignored the overwhelming evidence of hot pursuit and the trial court's ruling that the tote bag was searched in order to aid the pursuit of the second suspect. In any event, even on the facts recited by the California Supreme Court, the police were faced with an obvious need to search the tote bag as soon as possible. The opinion of the California Supreme Court reflects that at the time the tote bag was searched, a possibly armed suspect was still at large and the money taken in the robbery was still missing.

As the opinion also reflects, in spite of the fact the automobile license matched the suspect vehicles, not one shred of evidence of the robbery had been

found in the automobile or on respondent's person.

Complicating the search efforts was the delay occasioned because the automobile trunk had been locked and the key was "unavailable." Indeed, although the search of the automobile trunk and tote bag took place approximately forty minutes to one hour after the robbery, the police never, in any manner, voluntarily slowed in their search efforts. The only reason the trunk was not immediately opened on the highway was because there was no key to open it and there was fear an armed suspect might be in it. (RT 367.)

If an immediate search of the tote bag is not to be allowed in such situations, the hands of the police pursuing suspects are effectively tied. They must delay or impair pursuit to await a determination as to what, if anything, is in the tote bag. Meanwhile, an armed suspect may be endangering lives elsewhere and the loot from the robbery may be placed beyond reach.

The opinion of the California Supreme Court opens a primer for those who would use the automobile to commit crimes. It teaches that if individuals wish to commit crimes they should place some evidence in closed containers in the trunk of their vehicle, throw away the trunk key, then split up. There is nothing to lose and perhaps several hours to gain.

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C. As a Result of Its Incorrect Application of United States v. Chadwick and Refusal to Treat This Case As One Involving Exigency, the California Supreme Court Has, In Cases Where Police Are Searching For Suspects, Accorded Containers In Automobiles Greater Privacy Than Containers In Residences

As the opinion of the California Supreme Court and the record in this case clearly reflect, at the time the police stopped respondent's automobile and made contact with him, they knew the second, possibly armed, suspect was still at large and that the cash taken in the robbery, and guns used in the robbery were also missing. They did not know where or if, these items would be found anywhere in the automobile.

Nonetheless, the California Supreme Court has relied on United States v. Chadwick, supra, to hold the situation did not permit the officers to conduct a warrantless search of luggage in an automobile.

However, California, in reliance on other decisions by this Court, has concluded that where police enter a residence either in hot pursuit or by some other proper method, and are engaged in searching that residence for suspects, they may conduct a warrantless search of (1) items which may aid the pursuit of the suspects or (2) suspicious objects in plain view which there is probable cause to believe contain contraband, loot or other evidence of the crime. (People v. Gilbert (1965)

63 Cal.2d 690, 707 [408 P.2d 365, 375].)

The Gilbert case was reversed by this Court on other grounds in Gilbert v. California (1967) 388 U.S. 263. However, the principles of search and seizure noted by the California Supreme Court in its Gilbert opinion were reaffirmed by it in Guidi v. Superior Court (1973) 10 Cal.3d 1, 12-13, fn. 10; [513 P.2d 908, 914-915, fn. 10]. In reaffirming the search principles of Gilbert, the California Supreme Court states:

> " . . . we regard our statements of law made in People v. Gilbert, supra, 63 Cal.2d 690, as remaining the law of this jurisdiction save insofar as specifically disapproved by this court or the United States Supreme Court. The search and seizure portions of People v. Gilbert, supra, have not been disapproved. Indeed, in Gilbert v. California, supra, 388 U.S. at page 269 [18 L.Ed.2d at page 1184], the Supreme Court vacated certiorari on this issue as improvidently granted. The court explained this action in an appendix: 'Assuming that the warrantless entry into the apartment was justified by the need immediately to search for the suspect, the issue remains whether the subsequent search was reasonably supported by those same exigent circumstances. If the (evidence) were come upon in the course of a search for the suspect, the answer might be different from that where it is come upon, even though in plain view, in the course of a general, indiscriminate search of closets, dressers, etc., after it

> is known that the occupant is absent. Still different considerations may be presented where officers, pursuing the suspect, find that he is absent from the apartment but conduct a limited search for suspicious objects in plain view which might aid in the pursuit. . . ." (Guidi v. Superior Court, supra, 10 Cal.3d at 13, fn. 11 [513 P.2d at 916-917, fn. 11].)

The California Supreme Court then relied upon the search principles in its Gilbert opinion and Warden v. Hayden, supra, 387 U.S. 294, in concluding that police lawfully searching a residence for suspects could seize a paper bag found in plain view, where they had probable cause to believe it contained the hashish they were also searching for. (Guidi v. Superior Court, supra, 10 Cal.3d at 9, 14 [513 P.2d at 914, 916-917].)

The California Supreme Court went on to state:

> "Having determined that the seizure of the bag was reasonable, we turn now to the search of the bag after its seizure. Since the bag was seized as evidence, a search of its interior was 'reasonably related in scope to the circumstances which justified the interference in the first place.' Only by so searching the bag could Officer Holt confirm or discount his initial, constitutionally reasonable conclusion that it had evidentiary value. . . . Moreover, . . . police officers may

> 'properly examine suspicious objects in plain sight' not only to assess their evidentiary value but also to expedite the investigation which in the exigencies of the situation allowed the officers to gain a lawful view of the suspicious objects despite the lack of a search warrant." (Guidi v. Superior Court, supra, 10 Cal.3d 1, 18-19 [513 P.2d at 920-921] (emphasis added).)

If the police had pursued respondent into his residence soon after the robbery and searched the residence for the second suspect, they could have seized and searched the suspicious bulging tote bag assuming they also had probable cause under those circumstances to believe it contained contraband, loot, or other evidence.

Moreover, contrary to the conclusion of the California Supreme Court (People v. Minjares, supra, slip opinion, p. 10) had respondent and his crime partner split up on foot after the robbery, and had respondent been seized on the sidewalk with the suspicious tote bag in his hands, the police could have searched it for evidence which would lead to the quick apprehension of the second suspect and missing loot and firearms.

As petitioner has strenuously urged at every level of the proceedings, the controlling factor in this case is that police were searching for a suspect and missing loot, firearms, and other evidence. The refusal of the California Supreme Court to recognize this results in a gross and unreasonable inconsistency in the law. Since this inconsistency

rests upon interpretations of opinions by this Court, it is most respectfully urged certiorari should be granted.

The word "automobile" is not a talisman in whose presence the Fourth Amendment fades away and disappears (Coolidge v. New Hampshire (1971) 403 U.S. 443, 461-462.) By the opinion of the California Supreme Court, however, the word "automobile" becomes a talisman in whose presence the Fourth Amendment becomes an unreasonable impediment to law enforcement. The latter is as intolerable as the former.

II

THE CALIFORNIA SUPREME COURT INCORRECTLY APPLIED UNITED STATES v. CHADWICK RETROACTIVELY, AND, EVEN IF IT DID NOT, THE EXCLUSIONARY RULE SHOULD NOT OPERATE TO VOID THE SEARCH OF THE TOTE BAG

Regardless whether this Court's opinion in United States v. Chadwick, supra, is applicable to the type of situation presented herein, the question arises as to whether the California Supreme Court correctly applied it retroactively in this case to a crime occurring prior to the Chadwick decision.

The opinion below presupposes Chadwick announced no new rule of law, and at page 12, in footnote 6, cites United States v. Schleis (8th Cir. 1978) 582 F.2d 1166, in support of this conclusion. In particular, the California Supreme Court took note that this Court remanded Schleis for further consideration

in light of Chadwick, and thus concludes this Court would not have done so if Chadwick were not to apply retroactively.

Other federal cases, however, have held Chadwick did, indeed, announce a new rule of law which does not apply retroactively. (See United States v. Sink (5th Cir. 1978) 586 F.2d 1041, 1048, n. 8; United States v. Montgomery (5th Cir. 1977) 558 F.2d 311; United States v. Reda (2nd Cir. 1977) 563 F.2d 510, cert. den., 435 U.S. 973, rehg. den. 98 S.Ct. 2275; United States v. Choate (9th Cir. 1978) 576 F.2d 165, 182, fn. 20, cert. den., 99 S.Ct. 350; United States v. Berry (7th Cir. 1978) 571 F.2d 2, 3, cert. den. 99 S.Ct. 129; United States v. Mancillas (7th Cir. 1978) 580 F.2d 1301, 1306-1307, cert. den., 99 S.Ct. 361; United States v. Powell (E.D. Pa. 1978) 449 F.Supp. 562, 564.) While the fact certiorari has been denied in many of these cases is not conclusive as to this Court's attitude on the question of Chadwick's retroactivity, there is at least a question as to the correctness of the retroactive application of Chadwick by the California Supreme Court, and its reliance this Court's remand of United States v. Schleis, supra. Due to the conflict in existing authorities and what petitioner believes is inconclusive and inconsistent evidence of this Court's attitude on the retroactivity question, a resolution of the issue is being sought.

Even if Chadwick applies retroactively, and is controlling in this case, the exclusionary rule should not be applied to void the search of the tote bag. There is no question in this case that the officers conducting the search of respondent's automobile and tote bag were fulfilling

their duties and acting upon an honest and good faith belief that the search was proper. The fruits of the search are being excluded only because of legal pronouncement occurring some two years after the search itself. The exclusionary rule was designed to deter wrongs committed by police and deter dishonest searches. (Mapp v. Ohio (1961) 367 U.S. 643.) It has no value where, as here, there is nothing to deter and where any correction of action would occur so long after the search that its deterrent value is meaningless. This Court has recently applied similar reasoning to the situation where a police officer acted in good faith pursuant to a statute later declared unconstitutional. (Michigan v. DeFillippo (June 25, 1979) 47 U.S.L.Week 4805, 4807.)

III

THE OPINION BELOW IS BASED EXCLUSIVELY ON FEDERAL CONSTITUTIONAL AUTHORITY

The instant decision of the California Supreme Court is based exclusively upon an interpretation of the Federal Constitution and United States v. Chadwick, supra. There are no references to state statutory or constitutional grounds. Indeed, in footnote 8 of the California Supreme Court's opinion, page 17, the court states in pertinent part:

> "This opinion intimates no views on how the validity of the search in this case would be decided under the California Constitution."

For the foregoing reasons, petitioner submits that the opinion below

is based exclusively upon federal constitutional authority and is properly the subject of review by this Court on Writ of Certiorari.

CONCLUSION

For the foregoing reasons, petitioner submits that a Writ of Certiorari should be issued to review the decision of the California Supreme Court.

Respectfully submitted,

GEORGE DEUKMEJIAN,
Attorney General

ROBERT H. PHILIBOSIAN,
Chief Assistant
Attorney General

DANIEL J. KREMER,
Assistant Attorney General

ALAN S. METH,
Deputy Attorney General

Patricia D. Benke
PATRICIA D. BENKE,
Deputy Attorney General

Attorneys for Petitioner

APPENDIX A

[Filed May 25, 1979]

IN THE SUPREME COURT OF THE
STATE OF CALIFORNIA

Crim. 20549
(Super. Ct. No. 61376)

THE PEOPLE,

Plaintiff and Respondent,

v.

PAUL MICHAEL MINJARES,

Defendant and Appellant.

Appellant was convicted of two counts of first degree robbery (former Pen. Code, §§ 211, 211a) and was found to have been armed at the time of his arrest. He contends that the warrantless search of a tote bag found in his car's trunk after his arrest was unlawful. This court agrees.

I

Around 8:30 p.m., on December 19, 1975, Mariana Mungia and another employee were checking and bagging groceries at checkstand four of a Safeway store in Fremont. A tall man approached the checkstand, showed them he had a gun, and told them to put the money from the cash register into a paper bag. They complied. The tall man, subsequently identified as appellant's codefendant, then joined a smaller man, later identified as appellant, at checkstand one. The smaller man asked checker

SEE DISSENTING OPINION.

Tim Prinster for money. After noticing the gun in the taller man's hand and a bulge under the smaller man's belt, Prinster told the men to take the money. The smaller man reached into the open cash drawer, removed several bills and placed them in a paper bag. The pair then left the store.

Mark Sollitt, who was waiting for Prinster to get off duty, observed the robbery and followed the two robbers. He saw them get into a car which he followed until he noted its make and license number. Then Sollitt reported the robbery to the police and gave them a description of the perpetrators and the getaway car.

The Fremont police broadcast the information concerning the Safeway robbery at approximately 9 p.m. A subsequent broadcast informed police units that the getaway car was a white Ford with license plate number 075 ALC.

Shortly after this broadcast, Fremont Police Officer Perry spotted a white Ford with license number ALC 075 proceeding north on Highway 680. Officer Perry requested the help of backup units and proceeded to stop the white Ford. Appellant, the lone occupant of the car, was ordered out. Appellant fit the description of the smaller of the two Safeway robbers. He was searched, as was the passenger compartment of the car. Neither search revealed anything to connect appellant to the robbery. Officers were unable to locate a key to the car's trunk.

The witnesses to the Safeway robbery were brought to the scene of the car stop. Sollitt and Prinster had been informed that the police had "pulled over a car that matched the description and license identifications" of the perpetrators. Mungia was told that the police had "gotten one" of the

robbers. Despite these facts, no one was able to positively identify appellant as one of the robbers.

Appellant was arrested and taken to the police station. The white Ford was towed to the city corporation yard. The officers testified that they decided to open the trunk as soon as the Ford arrived at the yard rather than obtain a warrant because they believed that the second suspect might have been hiding in the trunk. None of the officers testified that they were looking for evidence that might lead them to the second suspect. The trunk's lock was picked, but no suspect was found. However, a red tote bag and several other items were removed from the trunk and photographed. The tote bag, which was zippered when recovered from the trunk,1/ was opened. In it were various items, including clothing similar to that described by witnesses to the robbery, three guns and a roll of pennies in a wrapper from the bank used by Safeway. All were admitted into evidence at the trial.

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1. At the initial suppression hearing, the officer who had picked the lock testified that the tote bag was open when he saw it in the trunk and that he could see a leather jacket and a gun butt in the bag. At trial the evidence technician who had searched the bag testified that the bag was zipped shut when it was found. Photographs not previously disclosed to the defense taken immediately before and after the bag's removal from the trunk also showed it closed. A second suppression motion was made on the basis of this newly discovered evidence. (Pen. Code, § 1538.5, subd. (h).) At the hearing on that motion, a second officer present at the search also testified that the bag had been closed. The second suppression motion was denied.

Sollitt, Prinster and Mungia identified appellant as one of the robbers prior to trial. At the trial, Mungia testified that the only reason she was able to identify appellant was because she had seen him on the highway.

Appellant testified that he had lent his car to a friend on the night in question and that the friend had transported some guns to San Jose to be sold. He stated that he had handled the guns. The car was returned to him shortly before he was stopped by the police. The prosecutor impeached this testimony by introducing a prior inconsistent statement by appellant immediately after his arrest and two unspecified prior felony convictions sustained in 1971. The codefendant was acquitted. Appellant was convicted and this appeal followed.

II

This court must decide the constitutional validity of a warrantless search of luggage which was found in the trunk of a car and placed under the exclusive control of the police, after the driver was taken into custody.

The Fourth Amendment guarantees individuals privacy in their persons, homes, papers and effects against unreasonable searches and seizures. The "cardinal principle" of Fourth Amendment analysis is that "'searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment -- subject only to a few specifically established and well-delineated exceptions.'" (Mincey v. Arizona (1978) ___ U.S. ___, ___ [98 S.Ct. 2408, 2412] quoting Katz v. United States (1967) 389 U.S. 347, 357; Wimberly v. Superior Court (1976) 16 Cal.3d 557, 563.) If the warrantless

search of the tote bag is to be upheld, it is the state's burden to show that the search falls within one of those exceptions. (McDonald v. United States (1948) 335 U.S. 451, 456; Badillo v. Superior Court (1956) 46 Cal.2d 269, 272.)

In the present case, the state primarily seeks to justify the search of the tote bag under the "automobile" exception to the warrant requirement. Soon after the automobile came into widespread use, the Supreme Court held that because of its mobility, an automobile that is stopped on the highway may be searched without a warrant when police officers have probable cause to believe it contains contraband or evidence of a crime. (Carroll v. United States (1925) 267 U.S. 132; see also Chambers v. Maroney (1970) 399 U.S. 42, 48-49.) The Supreme Court has further held that when there is justification for a warrantless search of an automobile stopped on the highway, the search is not invalid if undertaken later at the police station. (Chambers v. Maroney, supra, 399 U.S. at p. 52. But see id. at pp. 62-64, dis. opn. of Harlan, J.; Cady v. Dombrowski (1973) 413 U.S. 433, 450, dis. opn. of Brennan, J.; Cardwell v. Lewis (1974) 417 U.S. 583, 596, dis. opn. of Stewart, J.)

In the present case, at the time the trunk of appellant's car was searched and the tote bag was discovered, the car had been towed to the city corporation yard and appellant was in custody.2/ The officers' stated purpose in opening the trunk

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2. Although the automobile in the present case was impounded, the search of the trunk and tote bag were not a routine inventory of a suspect automobile. Such an inventory, not based on probable cause, involves entirely different considerations. (South

was to search for the second suspect himself.[3] The officers could have sought a search warrant, but chose not to because of the delay involved. Even if the possible presence of a second suspect in the car's trunk justified opening the trunk, that possibility would not necessarily validate the subsequent warrantless search of the tote bag. "[A] search which is reasonable at its inception may violate the Fourth Amendment by virtue of its intolerable intensity and scope." (Terry v. Ohio (1968) 392 U.S. 1, 18; Wimberly v. Superior Court, supra, 16 Cal.3d at p. 567.)

Appellant contends that under the recent Supreme Court decision in United States v. Chadwick (1977) 433 U.S. 1, the warrantless search of luggage which is under the exclusive control of police in invalid, notwithstanding the fact that the luggage has been seized from an automobile. In Chadwick, the Supreme Court held invalid the warrantless search of a footlocker that occurred while the footlocker was in the control of federal agents and over an

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2. (Continued)

Dakota v. Opperman (1976) 428 U.S. 364, 369.) It is clear that in an inventory search, police officers would have been free neither to unlock the trunk, nor to search the tote bag. (Mozzetti v. Superior Court (1971) 4 Cal.3d 699, 707-712.)

3. At oral argument, respondent contended that the purpose of the search was to discover evidence that might lead to the apprehension of the second suspect. No testimony appears in the record to support this contention. Thus, this theory of respondent is not available to justify the search in this case. (See Agar v. Superior Court (1971) 21 Cal.App.3d 24, 28-30.)

hour after its possessors had been arrested. Amtrak officials in San Diego had suspected that a footlocker bound for Boston contained marijuana. They alerted federal agents in San Diego, who forwarded a description of the footlocker and the persons involved to agents in Boston, who were on hand when the footlocker was picked up. While the suspects were seated on the footlocker, the agents had a trained dog sniff the footlocker. The dog reacted, indicating to the agents that the locker contained marijuana. The agents waited to seize the footlocker until it was placed in the trunk of a suspect's car. The footlocker was removed to the federal building where an hour and a half later it was opened and searched while the suspects were in custody.

The government in Chadwick attempted to justify the warrantless search of the footlocker by analogy to the "automobile" exception to the warrant requirement. (Cf. Chambers v. Maroney, supra, 399 U.S. 42.) In rejecting this contention, the Supreme Court noted that the "automobile" exception was based on (1) an automobile's "inherent mobility, which often makes obtaining a judicial warrant impracticable" (United States v. Chadwick, supra, 433 U.S. at p. 12), and (2) "the diminished expectation of privacy which surrounds the automobile." (Ibid.) However, the court stated, "[t]he factors which diminish the privacy aspects of an automobile do not apply to respondents' footlocker. . . . Unlike an automobile, whose primary function is transportation, luggage is intended as a repository of personal effects. In sum, a person's expectations of privacy in personal luggage are substantially greater than in an automobile." (Id., at p. 13, emphasis added.) In addition, the court noted that luggage may be seized and held secure until a warrant is obtained. This is not always true of automobiles. (Ibid.) Thus, the court rejected

the government's analogy, finding differences of constitutional dimension between the warrantless search of luggage and automobiles.

Although in Chambers v. Maroney the court had held that there was no constitutional difference between immobilization of an automobile pending issuance of a search warrant and immediate search (399 U.S. at pp. 51-52), in Chadwick this reasoning was held inapplicable to personal luggage. The increased expectation of privacy in the contents of the footlocker compelled the conclusion that with respect to luggage, immobilization, rather than immediate search, was the lesser intrusion. (United States v. Chadwick, supra, 433 U.S. at pp. 13-14, fn. 8.) Thus real, rather than theoretical, exigencies are required before luggage may be searched without a warrant. Since no exigency required the greater intrusion in Chadwick, it was held to be constitutionally impermissible. (Id., at p. 15.) As one United States Court of Appeals has commented, "Chadwick stands for the proposition that a warrantless search of personal property should be the exception and not the rule. Where, as here, the authorities are in control of the situation, they must obtain a warrant prior to searching luggage or similar personal property either on the scene or back at the stationhouse." (United States v. Johnson (5th Cir. 1979) 588 F.2d 147, 151; accord, United States v. Stevie (8th Cir. 1978) 582 F.2d 1175, 1179; United States v. Schleis (8th Cir. 1978) 582 F.2d 1166, 1172; but see United States v. Finnegan (9th Cir. 1977) 568 F.2d 637 [validating on the scene search of luggage in an automobile].)

As in Chadwick, the tote bag in the present case was searched while appellant was in custody and while the bag was under the exclusive control of police officers. Further, there were no exigent circumstances that would

have justified a warrantless search of the tote bag. While an automobile in police custody may conceivably be moved or broken into, the tote bag could have been held quite secure until a warrant was obtained. Whatever delay the obtaining of a search warrant might have entailed, it would not have resulted in the loss or destruction of any evidence that might have been in the tote bag.

Respondent argues that since Chadwick did not involve an automobile search, that case did not in any way limit the "automobile" exception which, it is asserted, extends to any closed containers found within an automobile. Respondent points out that Chambers was not overruled but was reaffirmed by the court in Chadwick. This is true but misses the point. Chambers did not involve a search of luggage and stands only for the proposition that once an automobile has been seized, a warrantless search is not a significantly greater intrusion than immobilization. Chadwick explicitly stated that this is not the case with luggage. (433 U.S. at pp. 13-14 and fn. 8; United States v. Johnson, supra, 588 F.2d at p. 153.) Although the government in Chadwick did not seek to justify the warrantless search of the footlocker under the "automobile" exception (433 U.S. at p. 11),4/ the logic of the Chadwick opinion suggests that an individual's interest in keeping private the contents of

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4. The government did argue in the trial court that the warrantless search of the footlocker could be justified under the "automobile" exception of Chambers v. Maroney, supra, 399 U.S. 42. The district court rejected this contention, and it was apparently abandoned by the government when the case was argued before the Supreme Court. (433 U.S. at pp. 5, 11.)

personal luggage is not lost simply because that luggage is placed in an automobile. "Every factor which the Court cites in support of its holding [in Chadwick] remains present whether the luggage is inside or outside an automobile." (United States v. Stevie, supra, 582 F.2d at p. 1179, original emphasis; United States v. Johnson, supra, 588 F.2d at p. 152.) Thus while Chambers may have sanctioned the warrantless search of automobiles in most cases, Chadwick refused to extend this exception to luggage. Chadwick clearly requires that a warrant be obtained once luggage is under the exclusive control of police.

It is clear from Chadwick itself that the tote bag would not have been subject to a warrantless search if appellant had been arrested on the street and the bag taken from his possession. The government had also contended in Chadwick that any property in the possession of one who is arrested is subject to a warrantless search. In rejecting this contention[5/] the Supreme Court stated that "warrantless searches of luggage or other property seized at the time of an arrest cannot be justified as incident to that arrest either if the 'search is remote in time or place from the arrest,' [citation], or no exigency exists. Once law enforcement officers have reduced luggage or other personal property not immediately associated

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5. The government also contended that because an individual has a lesser privacy interest in a footlocker than in a dwelling or a private communication, only a showing of probable cause is necessary for its warrantless search. This contention was also rejected. (433 U.S. at pp. 6-11.)

with the person of the arrestee to their exclusive control, and there is no longer any danger that the arrestee might gain access to the property to seize a weapon or destroy evidence, a search of that property is no longer an incident of the arrest." (433 U.S. at p. 15, emphasis added; see also United States v. Schleis, supra, 582 F.2d at p. 1172.) Further, had appellant been arrested in his home, the tote bag could not have been searched without a warrant. (Chimel v. California (1969) 395 U.S. 752, 763; see also People v. Robinson (1974) 41 Cal.App.3d 658, 669.) It would be anomalous indeed if personal effects not otherwise subject to a warrantless search could be searched simply because they were found in an automobile. Given the omnipresence of automobiles in modern life, such a holding would considerably diminish individual privacy.

The principles underlying Chadwick -- and the Fourth Amendment -- are not altered because the luggage in this case was found in the course of a search of an automobile. As the Supreme Court has observed, "[t]he word 'automobile' is not a talisman in whose presence the Fourth Amendment fades away and disappears." (Coolidge v. New Hampshire (1971) 403 U.S. 443, 461-462.)

The cardinal principle of the Fourth Amendment is that a warrant is required unless some grave emergency can be shown that necessitates an immediate search without a warrant. (McDonald v. United States, supra, 335 U.S. at pp. 455-456.) Further, "a warrantless search must be 'strictly circumscribed by the exigencies which justify its initiation.'" (Mincey v. Arizona, supra, ___ U.S. at p. ___ [98 S.Ct. at p. 2414].) When those circumstances cease to exist, the exception also ceases to exist and a warrant must be obtained. This is the rationale of Chadwick: "Even

though on this recod the issuance of a warrant by a judicial officer was reasonably predictable, a line must be drawn. In our view, when no exigency is shown to support the need for an immediate search, the Warrant Clause places the line at the point where the property to be searched comes under the exclusive dominion of police authority." (433 U.S. at p. 15, emphasis added.) To hold otherwise would exalt the exceptions above the rule.6/

Respondent alternatively argues that the automobile was itself an "instrumentality" of the crime, since it was used in

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6. In view of the principle that a warrant is required unless the circumstances dictate otherwise, it is evident that Chadwick did not announce a new rule of law. Therefore, no retroactivity problem is encountered in applying Chadwick to this case. It was the government in Chadwick which sought the formulation of a new rule that luggage could be searched without a warrant by analogy to the "automobile" exception. The Supreme Court declined to apply the "automobile" exception in that fashion. Instead, it held that since no exigent circumstances were shown, a warrant was required to search the footlocker under the Fourth Amendment. Thus, no new rule was announced. (See United States v. Schleis, supra, 582 F.2d at p. 1174.) Schleis, which had originally upheld a delayed warrantless search of a briefcase in the defendant's possession at the time of his arrest, was remanded by the Supreme Court for further consideration in light of Chadwick. (Schleis v. United States (1977) 433 U.S. 905.) The Supreme Court would not have done so if Chadwick were not to apply retroactively. (582 F.2d at p. 1172. See also United States v. Stevie, supra, 582 F.2d at p. 1178, fn. 1.)

appellant's escape. Therefore, it is argued the car and its entire contents, including the tote bag, were subject to a thorough search under what is termed the "instrumentality" exception. Chambers v. Maroney, supra, 399 U.S. 42 and this court's opinions in People v. Teale (1969) 70 Cal.2d 497, People v. Laursen (1972) 8 Cal.3d 192 and People v. Hill (1974) 12 Cal.3d 731 are cited in support of this position.

Respondent reads more into these cases than is there. In general, the belief that an automobile was used in the perpetration of a crime merely supplies the requisite probable cause to search the car. (See Almeida-Sanchez v. United States (1973) 413 U.S. 266, 269.) It does not justify its warrantless search. To the extent that there is a separate "instrumentality" exception under either Constitution which in any way adds to the "automobile" exception, it is inapplicable to the facts of this case.

In People v. Teale, supra, 70 Cal.2d 497, this court upheld the delayed search by a criminalist of an automobile thought to have been used in a kidnap-murder. This court reasoned that an automobile which is seized "in the reasonable belief that [it] is itself evidence" could be searched "for the purpose of determining its evidentiary value" on the theory that such an examination was not a search within the Fourth Amendment. (Id., at p. 511, original emphasis.) However, the court in Teale was careful to distinguish between a car as a container of evidence and a car which is itself evidence of a crime. (Id., at p. 511, fn. 10.) An examination of the former is clearly a search and must be justified under a recognized exception to the warrant requirement.

In subsequent cases, this court has clarified Teale, holding that any examination

of a seized automobile is a search and therefore must be reasonable under the Fourth Amendment. (Mozzetti v. Superior Court, supra, 4 Cal.3d at pp. 705-706; see also Guidi v. Superior Court (1973) 10 Cal.3d 1, 18-19, fn. 19.) Although a seizure and inspection of a vehicle thought to have been used in a kidnapping was upheld by a divided court in North v. Superior Court (1972) 8 Cal.3d 301, that case, like Teale, principally involved a scientific examination of the interior of the car to determine whether the victim had been inside and a measurement and examination of its exterior. (See also Cardwell v. Lewis, supra, 417 U.S. 583, upholding the removal of paint and the taking of tire impressions from the exterior of a car.)

The "instrumentality" exception as advanced by the respondent would go far beyond the rationale of Teale and North. Because an automobile may be said to be "used" in the commission of virtually every offense for which it is a container of evidence, the instrumentality exception as proposed by respondent would effectively end all Fourth Amendment scrutiny of automobile searches. Such a result would be clearly counter to the many decisions of this court which carefully circumscribe the "automobile" exception. (E.g., Wimberly v. Superior Court, supra, 16 Cal.3d 557; Mozzetti v. Superior Court, supra, 4 Cal.3d 699; People v. Cook (1975) 13 Cal.3d 663.) Moreover, for the reasons stated above, such a result, if it sanctioned the warrantless search of luggage within the exclusive control of the police, would be counter to United States v. Chadwick, supra, 433 U.S. 1. If there were any vitality to the "instrumentality" exception as it applied to automobiles or other containers of evidence, it would be applicable only to a scientific examination of the object itself, for example for fingerprints, bloodstains, or the taking of tire

impressions or paint scrapings. (See Cardwell v. Lewis, supra, 417 U.S. at p. 591.)

Police officers may, if they have probable cause, under certain circumstances search the interior of a car and, with further probable cause, its trunk. However, the factors underlying the "automobile" exception do not support a warrantless search of closed personal effects found within an automobile. Once a closed container comes under an officer's exclusive authority, an immediate search is no longer necessary. Thus probable cause to believe the item contains contraband or evidence of a crime can support at most the seizure of the item; but a warrant must be obtained for its search. (United States v. Johnson, supra, 588 F.2d at p. 151; United States v. Stevie, supra, 582 F.2d at p. 1180.)7/

The holding of this case is a narrow one. It will entail no dimimution of the ability of law enforcement officers to apprehend those suspected of breaking the criminal law. Where probable cause is believed to exist to search a container found within an automobile, the container may be seized and held until a magistrate determines whether a warrant may be issued for its search. Where

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7. There is no merit to respondent's suggestion that an individual who uses an automobile in the commission of a crime thereby forfeits any expectation of privacy in the automobile or its contents. As the Supreme Court has said in rejecting a similar contention, "it suffices here to say that this reasoning would impermissibly convict the suspect even before the evidence against him was gathered." (Mincey v. Arizona, supra, ___ U.S. at p. ___ [98 S.Ct. at p. 2413]; see also Michigan v. Tyler (1978) 436 U.S. 499, 505-506.)

exigent circumstances dictate an immediate search, a closed container found in an automobile may be searched without a warrant. (See, e.g., United States v. Chadwick, supra, 433 U.S. at p. 15, fn. 19; United States v. Gaultney (5th Cir. 1978) 581 F.2d 1137.) By requiring as a rule only the lesser intrusion of seizure and immobilization of personal effects rather than immediate search, maximum respect for individual privacy can be maintained at relatively little cost to law enforcement. An individual who prefers immediate search rather than the inconvenience of immobilization may always consent to an immediate search. (See Chambers v. Maroney, supra, 399 U.S. at p. 64, dis. opn. of Harlan, J.; see generally Williamson, The Supreme Court, Warrantless Searches, and Exigent Circumstances (1978) 31 Okla. L.Rev. 110, 144-147; Note, United States v. Chadwick and the Lesser Intrusion Concept: The Unreasonableness of Being Reasonable (1978) 58 B.U. L.Rev. 436, 464-468.)

The Supreme Court recently observed that "[t]he investigation of crime would always be simplified if warrants were unnecessary. But the Fourth Amendment reflects the view of those who wrote the Bill of Rights that the privacy of a person's home and property may not be totally sacrificed in the name of maximum simplicity in enforcement of the criminal law. [Citation.]" (Mincey v. Arizona, supra, ___ U.S. at p. ___ [98 S.Ct. at p. 2414].) A constant tension exists between the needs of law enforcement and the right of individual privacy. The Fourth Amendment embodies our founders' resolution of that tension: the requirement that the determination of probable cause to search be made by a neutral and detached magistrate, rather than "the officer engaged in the often competitive enterprise of ferreting out crime." (Johnson v. United States (1948) 333 U.S. 10, 14.) Courts must be ever watchful that the

delicate balance embodied in the Fourth Amendment is maintained. "It is precisely the predictability of these pressures that counsels a resolute loyalty to constitutional safeguards." (Almeida-Sanchez v. United States, supra, 413 U.S. at p. 273.) The balance is best maintained by a faithful adherence to the warrant requirement except where exigent circumstances dictate an exception. The warrantless search of the tote bag was invalid under the Fourth Amendment.[8] Since the evidence seized from the tote bag constituted a substantial part of the prosecution's case, reversal of appellant's conviction is required. (Chapman v. California (1967) 386 U.S. 18, 23-24.)

The judgment is reversed.

BIRD, C.J.

WE CONCUR:

TOBRINER, J.
MOSK, J.
MANUEL, J.
NEWMAN, J.

I CONCUR IN THE RESULT:

RICHARDSON, J.

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8. In light of this holding, it is not necessary to reach the other contentions raised by appellant. This opinion intimates no views on how the validity of the search in this case would be decided under the California Constitution.

PEOPLE V. MINJARES
Crim. 20549

DISSENTING OPINION BY CLARK, J.

The warrantless search of the bag found in the trunk of defendant's car was justified under the "automobile exception" to the warrant requirement. (Carroll v. United States (1925) 267 U.S. 132; Chambers v. Maroney (1970) 399 U.S. 42; United States v. Finnegan (9th Cir. 1977) 568 F.2d 637.) United States v. Chadwick (1977) 433 U.S. 1 is consistent with this conclusion.

In Chadwick, railroad officials in San Diego observed Machado and Leary load a footlocker onto a train bound for Boston. Their suspicions were arounsed when they noticed that the trunk was unusually heavy for its size, and that it was leaking talcum powder, a substance often used to mask the odor of marijuana or hashish. Because Machado matched a profile used to spot drug traffickers, the railroad officials reported these circumstances to federal agents in San Diego, who in turn relayed the information, together with detailed descriptions of Machado and the footlocker, to their counterparts in Boston.

When the footlocker arrived in Boston federal narcotics agents used a trained dog to ascertain it contained marijuana. The agents then waited until Chadwick and Machado lifted the locker into the trunk of Chadwick's car. "At that point, while the trunk of the car was still open and before the car engine had been started," the agents arrested them. At the federal building an hour and a half later, the agents, without a warrant, opened the locker and discovered marijuana. (United States v. Chadwick, supra, 433 U.S. at pp. 3-4.)

In the federal district court, the government explained its omission to obtain a search warrant was justified under the automobile exception of Chambers v. Maroney, supra, 399 U.S. 42. Rejecting this argument on the ground that the relationship between the footlocker and Chadwick's automobile was merely coincidental, the district court suppressed the marijuana, and the court of appeals affirmed. As the majority note (ante, p. __, fn. 4*), the government abandoned this contention when the case was argued before the Supreme Court. "The Government does not contend that the footlocker's brief contact with Chadwick's car makes this an automobile search, but it is argued that the rationale of our automobile search cases demonstrates the reasonableness of permitting warrantless searched of luggage; the Government views such luggage as analogous to motor vehicles for Fourth Amendment purposes." (433 U.S. at pp. 11-12.)

The government's argument rested on the novel proposition that "the Fourth Amendment Warrant Clause protects only interests traditionally identified with the home." (433 U.S. at p. 6.) "Drawing on its reading of history, the Government argues that only homes, offices, and private communications implicate interests which lie at the core of the Fourth Amendment. Accordingly, it is only in these contexts that the determination whether a search or seizure is reasonable should turn on whether a warrant has been otained. In all other situations, the Government contends, less significant privacy values are at stake, and the reasonableness of a government intrusion should depend solely on whether there is probable cause to believe evidence

*Majority opinion, page 11, footnote 4.

of criminal conduct is present. Where personal effects are lawfully seized outside the home on probable cause, the Government would thus regard searches without a warrant as not 'unreasonable.'" (Id. at p. 7.)

Rejecting this argument, the Supreme Court declined to extend the automobile exception to all movable personalty lawfully seized in a public place. The high court pointed out that it is the diminished expectation of privacy surrounding the automobile, rather than its mobility, which justifies a warrantless search. "The factors which diminish the privacy aspects of an automobile do not apply to respondents' footlocker," the court held. "Luggage contents are not open to public view, except as a condition to a border entry or common carrier travel; nor is luggage subject to regular inspections and official scrutiny on a continuing basis. Unlike an automobile, whose primary function is transportation, luggage is intended as a repository of personal effects. In sum, a person's expectations of privacy in personal luggage are substantially greater than in an automobile." (433 U.S. at p. 13.)

As the Ninth Circuit Court of Appeals has recognized, "a unique fact situation was presented in Chadwick which controlled the outcome of the case. Had the facts been only marginally different, as Justice Blackmun pointed out in his dissenting opinion, the search would have been upheld under established exceptions to the warrant requirement. The agents could have avoided having the footlocker search held unconstitutional either by delaying the arrest for a few minutes until the car was in motion or by conducting the search at the time and place of the arrests." (United States v. Finnegan (9th Cir. 1977) 568 F.2d 637, 641, fn. omitted; accord, United States

v. Ochs (2d Cir. 13 March 1979) ___ F.2d ___.*)

This point bears repetition. As Justice Blackmun emphasized in his dissenting opinion--without contradiction by the majority--Chadwick does not limit the automobile exception to the warrant requirement by holding that closed containers found in an automobile are outside the scope of that exception. To the contrary, as Justice Blackmun pointed out, "if the agents had postponed the arrest just a few minutes longer until the respondents started to drive away, then the car could have been seized, taken to the agents' office, and all its contents--including the footlocker--searched without a warrant." (433 U.S. at pp. 22-23.) "The scope of the 'automobile search' exception to the warrant requirement extends to the contents of locked compartments, including glove compartments and trunks. [Citation.] The Court of Appeals have construed this doctrine to include briefcases, suitcases, and footlockers inside automobiles. United States v. Tramunti, 513 F. 2d 1087, 1104-1105 (CA2 1975); United States v. Issod, 508 F.[2d] 990, 993 (CA7 1974), cert. denied, 421 U.S. 916 (1975); United States v. Soriano, 497 F. 2d 147 (CA5 1974) (en banc), convictions summarily aff'd sub. nom. United States v. Aviles, 535 F. 2d 658 (1976), cert. pending, Nos. 76-5132 and 76-5143; United States v. Evans, 481 F. 2d 990, 993-994 (CA9 1973)." (Id. at p. 23, fn. 4.)

Chadwick's limited significance has been pointed out by the Ninth Circuit in United States v. Finnegan, supra, 568 F.2d 637. "The Supreme Court in Chadwick did not substitute a test of 'expectation of privacy' for probable cause. Indeed, the Court did not address the tests for, or scope of, the automobile search

*Advance Report Citation: 25 Crim.L.Rptr. 2054.

exception since those issues were not before it in light of the government's failure to renew on appeal its argument based on the automobile exception. Rather, Chadwick explicates the rationale for excepting a new class of objects from the usual proscription against warrantless searches. Chadwick lays down a rule whereby courts faced with an invitation by the government to define a new class of objects which may be searched without warrant must consider whether there is a diminished expectation of privacy with respect to that class of objects." (Id. at p. 641.)

The warrantless search of the bag found in the trunk of defendant's car having been justified under the automobile exception to the warrant requirement, the judgment should be affirmed.

CLARK, J.

APPENDIX B

CLERK'S OFFICE, SUPREME COURT
4250 STATE BUILDING

SAN FRANCISCO, CALIFORNIA 94102

Jun 27, 1979

I have this day filed Order _____

[redacted]

REHEARING DENIED

In re: CRIM No. 20549
PEO

vs.

Mirgains

Respectfully,

G. E. BISHEL
Clerk

[illegible] 827 11 78 AM Dist

APPENDIX C

[Filed April 17, 1978]

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

1 CRIM. NO. 15834

(Sup.Ct.No. 61376)

PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

PAUL MICHAEL MINJARES,

Defendant and Appellant.

Defendant, Paul M. Minjares, appeals from a judgment1/ entered on a jury verdict finding him guilty of two counts of first degree robbery (Pen. Code, § 211), and using a handgun during the commission of these offenses (Pen. Code, § 12022.5). He contends that: (1) the search of the trunk and subsequent search of the tote bag found in the trunk were invalid, as they were made without a warrant and not based on probable cause;

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1. The notice of appeal erroneously indicates that an appeal is also taken from the sentence. As the sentence is not separately appealable but merged in the judgment, this purported appeal must be dismissed.

(2) the single suspect confrontation and subsequent identifications were impermissibly suggestive and deprived him of due process; (3) failure to disclose the nature of the prior felony convictions that were used to impeach him constituted prejudicial error; and (4) he was not sufficiently advised of the effect of admitting his priors and of being armed with concealed weapons at the time of his arrest. We have concluded that the judgment must be reversed for a limited new trial on the issue of the prior convictions.

In view of the absence of any contentions concerning the sufficiency of the evidence, a brief summary of the pertinent facts will suffice.

Around 8:30 p.m. on December 19, 1975, James Gondal and Mariana Mungia were bagging and checking groceries at checkstand four in a Fremont Safeway store. A tall person, subsequently identified as the codefendant, B. Aguirre,2/ came up, showed them he had a gun, and told them to put the cash register money in a paper bag. Gondal and Ms. Mungia complied.

After taking the money from checkstand four, Aguirre joined the second and smaller robber (subsequently identified as defendant), who was at checkstand one. Defendant asked the checker there, Tim Prinster, for money, at gunpoint. Prinster turned over his cash register money after he noticed the gun in Aguirre's hand and a "bulge" under defendant's belt.

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2. Aguirre was acquitted.

Mark Sollitt, who was waiting for Prinster to get off duty, was in the Safeway store and witnessed the robbery and defendant's participation in it. After defendant and Aguirre left the store, Sollitt followed and saw them get into a car. He pursued them in his own car for about five to ten minutes, at times at a speed of 80 miles per hour, until he got close enough to read the license and determine that the getaway vehicle was a 1968 or 1969 Ford Fairlane. He then went to the police department to report the robbery, describe the robbers, their vehicle and its license number. Prinster indicated that defendant was about five feet six inches tall, weighed about 150 pounds, and was wearing a blue stocking cap and had a "fumanchu-type" mustache.

About 9:00 p.m., the Fremont police received and then broadcast the information concerning the Safeway robbery. One of the robbers was described as a male Mexican adult, about 28 years old, wearing levis and a tan leather jacket. A subsequent broadcast informed units that the getaway car was a white Ford with the confirmed license number 075 ALC.

Fremont Police Officer William Perry received this information on a radio dispatch shortly thereafter and about 15 minutes later, he observed a white Ford with license number ALC 075 proceeding north on Highway 680. Perry requested cover units and then stopped the vehicle. Perry then ordered its only occupant, the driver, subsequently identified as defendant, out of the car. Defendant fit the physical description of one of the Safeway robbery suspects. He was searched and advised he was under arrest for armed robbery. A search of the passenger compartment of the vehicle

revealed nothing to connect defendant to the robbery. Defendant was then asked if he had a key to the trunk and replied negatively.

Sollitt, Prinster and Ms. Mungia were brought out to the location of the auto stop. Prinster and Sollitt were told that the vehicle identified by Sollitt had been stopped; Ms. Mungia was told that the police had "gotten one." Prinster and Sollitt declined to make a positive identification of defendant at that time and indicated they wanted to see him under better conditions. Subsequently, they identified defendant as one of the robbers at a photo lineup, a physical lineup, the preliminary hearing, and a pretrial hearing. On their way to and from the road showup, Sollitt, Prinster and Ms. Mungia discussed their ability to identify the robbers. Neither Prinster nor Sollitt were certain of their identification at the roadside showup on the night of the robbery. Ms. Mungia was not able to identify defendant at that time; she subsequently indicated that the only reason she was able to identify defendant from the photographs and at the lineup was because of the one-man showup.

In order to search the trunk for the second suspect, whom the authorities believed might be hiding there,3/ and to further examine the vehicle, the Ford was towed to the Fremont City Corporation Yard about 11:00 p.m. Armed officers stood by as a precaution as the trunk lock was picked. No suspect was found inside. However, among the many items, a red Samsonite tote bag stood out, was removed, and photographed

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3. A search warrant had been considered but rejected because of the immediacy of getting into the trunk, in light of the suspicion that the second robber might be hidden there.

and then opened by Sergeant Phillips. The tote bag contained, among other items, clothing matching the description of that worn by the suspects, three handguns with defendant's and Aguirre's fingerprints, and a roll of pennies in a bank wrapper identical to those used by the Safeway store. All of these items were admitted into evidence for purposes of identification, after denial of two defense motions to suppress.4/

Defendant took the stand and denied any participation in the robbery or any knowledge of the use of his car in the robbery. He admitted, however, that his vehicle had been borrowed on that evening by a friend to transport some guns to San Jose to be sold. Defendant was to receive $75.00 to $100.00 for the use of his car. He helped load the guns into the trunk. His vehicle had been returned to him shortly before he was stopped by the police. This alibi was impeached by the introduction of a statement made by defendant immediately after his arrest and advisement of Miranda rights. This statement indicated that he had been

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4. At the initial pretrial suppression hearing on March 29, 1976, Officer Phillips testified that the tote bag was open when it was seen in the trunk. After testimony at trial and the photograph not preivously disclosed to the defense indicated that the tote bag was, in fact, zipped shut at the time of its discovery, a second suppression hearing was conducted by the trial court pursuant to a defense motion. The second defense suppression motion was denied without a specific finding by the trial court as to whether the tote bag was open or shut when the guns, clothing and roll of pennies were found and removed.

with the codefendant all evening and that no one else had driven his car. Defendant was further impeached by his admission of two unspecified prior felony convictions in 1971 in two different counties.

Defendant's major contentions on appeal concern the legality of the search of the trunk of his automobile and its contents, the one-man showup and the fact that the nature of his admitted prior convictions was not revealed to the jury.

We turn first to the warrantless search of the trunk and the closed tote bag. Defendant's contention concerning the illegality of the search of the trunk need not detain us long here. Defendant, relying on Wimberly v. Superior Court, 16 Cal.3d 557, argues that here, as there, the initially reasonable search of a car's interior became unreasonable when extended to the locked trunk that was a distant part of the car in which there is a reasonably greater expectation of privacy than in the passenger's compartment. Our Supreme Court said at page 568: "A search based on probable cause which reasonably only tends to support the inference that contraband or evidence will be found in the passenger compartment will be of intolerable intensity and scope if expanded to include a closed trunk. In such a situation there must be some specific articulable facts which give reasonable cause to believe that seizable items are, in fact, concealed in the trunk."

The court then, at page 569, distinguished People v. Laursen, 8 Cal.3d 192, where the vehicle had been identified by eyewitnesses as the one used by the robbers in an aborted attempt to escape. The court said: "We upheld the search, including a search of the trunk even though there was no specific information that the trunk contained

any evidence relating to the crime. It is important to note, however, that the probable cause upon which we upheld that search pertained to the vehicle as a whole. Thus, we said: 'Having connected the robbery with the Mercury on the basis of these reports the officers had reason to suspect that some evidence helpful in the apprehension of the culprits and investigation of the crime would be contained within.' (Id., at p. 201, fn. 8.)" (Emphasis added.) Here, also, where the vehicle used in the robbery was stopped shortly after the robbery, there was probable cause for the search of the trunk.

Defendant, relying on United States v. Chadwick, 53 L.Ed.2d 538, argues that even if so, the subsequent search of the tote bag required a warrant. Chadwick, supra, summarized in footnote 5 below,5/ is inapposite here as it involved the search of a personal effect, not an automobile. Here, there was a nexus between the vehicle and the search, as the vehicle was an instrumentality of the crime.

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5. In Chadwick, supra, 53 L.Ed.2d 538, decided June 21, 1977, the U.S. Supreme Court held unlawful the warrantless search of a locked footlocker lawfully seized by federal agents from the open trunk of a parked automobile during the arrest of the persons in possession of the footlocker on probable cause that the footlocker contained contraband. The defendants were arrested and the footlocker was removed to the Boston Federal Building under the exclusive control of the federal agents, and opened. The court (at pp. 549 and 551) emphasized that a person's expectations of privacy of personal luggage are substantially greater than in automobiles, and held at page 551, that under the circumstances, the search was no longer incident to the arrest and, therefore, subject to the warrant requirement.

We agree with the People that the search of the tote bag here was proper pursuant to the rule of Chambers v. Maroney, 399 U.S. 42. Chambers, supra, held that a search without a warrant of an automobile stopped on the highway is permissible if based on probable cause, and further that under the circumstances present in Chambers, a delay in the search until the car had been taken to the station house was permissible. Texas v. White, 423 U.S. 67, held that the probable cause for a search of a car at the scene of the arrest still obtains at the station house (id., at p. 68). The Chambers exception to the warrant requirement in the limited class of searches of automobiles rests on two factors: (1) the "exigent circumstances that exist in connection with movable vehicles" (Cardwell v. Lewis, 417 U.S. 583, 590); and (2) the diminished expectation of privacy that attends automobiles, as opposed to a house, a person, or personal effects (Almeida-Sanchez v. United States, 413 U.S. 266, 279).

United States v. Soriano (5th Cir. 1974) 497 F.2d 147, demonstrates that the Chambers rationale can be used to sustain the legality of a search under analogous circumstances. In Soriano, supra, the evidence showed that federal law enforcement officials followed a taxi occupied by three people whom the agents had probable cause to believe were transporting heroin. Upon arrival at the Miami International Airport, the agents arrested the occupants of the cab, and removed three suitcases from that vehicle. The agents peeked into one of the suitcases at the place of arrest; the other two were searched at a place other than that of arrest. The searches were sustained as to all three suitcases.

The California Supreme Court has clearly indicated that whatever the proper scope of Chambers, supra, 399 U.S. 42, as a matter of federal constitutional law it must not be extended so far beyond its original rationale under the "more exacting standard for cases arising within this state" established by article I, section 13 of the California Constitution (People v. Brisendine, 13 Cal.3d 528, 545). The standard was summarized by our Supreme Court in People v. Hill, 12 Cal.3d 731, at page 751, as follows: "'. . . when there is probable cause to believe that an automobile stopped on a highway contains contraband, evidence of a crime, or was itself an instrumentality of the commission of one, law enforcement officers need not obtain a warrant before conducting a search since there is no distinction of constitutional proportion between an immediate search on probable cause without a warrant and the automobile's immobilization until one is secured,'" quoting from People v. Laursen, supra, 8 Cal.3d 192, 201, emphasis added.

Thus, here, under both the federal constitutional rule and the more stringent state one, probable cause6/ pertained to the vehicle as a whole. The vehicle was an instrumentality of the crime, and was seized in hot pursuit within a short period after the commission of the robbery. Thus, the vehicle and all of its contents, including the tote bag, were

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6. The search of the trunk and tote bag were not a routine inventory of a suspect automobile. Such an inventory, not based on probable cause, involves entirely different considerations (South Dakota v. Opperman, 49 L.Ed.2d 1000, 1008). It is clear that in an inventory search, the People would have been free neither to unlock the trunk, nor to search the tote bag found therein (Mozzetti v. Superior Court, 4 Cal.3d 699, 707-712; People v. Jochen, 46 Cal.App.3d 243, fn. 3, at p. 284).

subject to a detailed examination after the seizure (cf. People v. Teale, 70 Cal.2d 497, 511). Here, as in People v. Hill, supra, 12 Cal.3d 731, there were circumstances that led the officers to reasonably believe that the fruits of the robbery or some evidence helpful in the investigation of the robbery would be contained within the tote bag (People v. Laursen, supra, 8 Cal.3d, fn. 8 at p. 201). It follows that the search of the tote bag was also lawful and the defense motions to suppress the items found in it properly denied.

We turn next to the contention concerning the unfairness of the single suspect on-the-road confrontation and that this was the basis of the subsequent identification of defendant by Sollitt and Prinster. While a less suggestive procedure would have been preferable to the initial roadside showup, we need not discuss this contention in detail. As this Court (Division One) indicated in People v. Rodriguez, 10 Cal.App.3d 18, 30, where it is asserted under the rule of Stovall v. Denno, 388 U.S. 293, 302, and In re Hill, 71 Cal.2d 997, pages 1004-1005, that the pretrial identification procedures were so unfair as to taint any subsequent in-court identification, the proper procedure is an initial hearing outside the presence of the jury. At this hearing, the defendant must demonstrate that the pretrial confrontation infringed on his right to due process of law. Where, as here, the trial court decides that the pretrial identification procedures, in their totality, were not so unfair as to taint an in-court identification, the identifying witness may identify the defendant in court without the necessity of showing that the courtroom identification had an origin independent of the pretrial proceedings. The defendant may then offer evidence of unfairness which

affects the weight rather than the admissibility of the identification.

Here, the requisite hearing was held and the trial court ruled that the pretrial identification procedures were not so unfair as to taint an in-court identification. The record shows that both Sollitt and Prinster declined to make a positive identification of defendant at the single person roadside showup. After they had an opportunity to see defendant under better conditions, they picked him out as one of the robbers from a series of photographs and in a lineup. As the record substantially supports the trial court's determination and also indicates an independently reliable basis for the identification, we cannot disturb it on appeal (People v. Greene 34 Cal.App.3d 622, 646-647).

Next, we turn to the contentions concerning defendant's admitted prior convictions for robbery that were used to impeach his testimony.7/ The record indicates that

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7. A motion predicated on People v. Beagle 6 Cal.3d 441, and People v. Rist, 16 Cal.3d 211, was timely made and renewed. Under the applicable rules, at least one of the prior robbery convictions could have been properly used to impeach him to avoid giving his testimony a false aura of veracity (People v. Boothe, 65 Cal.App.3d 685, 688-689). Any one of the prior robberies reflected directly on defendant's honesty and integrity, and revealing its nature could have been more harmful here than the brief impeachment by two unidentified priors.

defendant admitted four prior convictions for robbery, three of which occurred in Riverside County in 1971, and the fourth in San Bernardino County in 1971.8/ The court permitted the use for impeachment of two of the 1971 priors, one from each county.

The instant case was tried prior to People v. Rollo, 20 Cal.3d 109, wherein our Supreme Court held that it was error to impeach a defendant by prior convictions, whose nature is not revealed to the jury. In Rollo, supra, the court pointed to two fundamental reasons for the rule: (1) the jury is deprived of information essential to its deliberations; and (2) the defendant is initially prejudiced as he must choose between remaining silent and subjecting himself to improper speculation by the jury or incurring the risk that by divulging the nature of the priors, the jury will draw an impermissible inference of guilt.

As Rollo is aimed at the integrity of the fact-finding process pursuant to the applicable rules of retroactivity as most recently set forth in People v. Gainer, 19 Cal.3d 835, 853, the Rollo rule should be applied to the instant case, which was pending on appeal when Rollo was decided on October 11, 1977. The record indicates that the jury was left to speculate not only as to the nature of defendant's prior convictions, but also as to the critical issue of the relationship between the character of defendant's undisclosed priors and his credibility. The jury was not admonished to refrain from speculation and the prosecution also elicited the fact that defendant was on parole at the time of the instant robbery.

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8. The dates in the information were apparently incorrect and subsequently amended. A fifth admitted prior conviction for possession of marijuana while defendant was committed to the Youth Authority was subsequently stricken for purposes of penalty enhancement.

In Rollo, supra, 20 Cal.3d 109, however, the court held that such an error was not prejudicial per se and in Rollo was not of prejudicial dimension, as the case against the defendant was overwhelming. Defendant here was apprehended shortly after the robbery and driving the getaway car, which contained some of the loot, the guns and the clothing worn by the robbers. He had attempted to flee at great speed and was identified by two eyewitnesses. His only defense consisted of his rather strained alibi that the jury obviously did not believe.

Here, as in Rollo, supra, 20 Cal.3d at pages 120-121, none of this evidence was tainted by the error of failing to identify the nature of the prior. Defendant also was not kept from testifying and had ample opportunity to present his case to the jury. That it was unconvincing was not the result of the Rollo error, but of the weakness of defendant's story. We conclude, after an examination of the entire cause, including the evidence, that it is not reasonably probable that a result more favorable to defendant would have been reached in the absence of this error (Cal. Const., art. VI, § 13; People v. Watson, 46 Cal.2d 818, 836).

Finally, we turn to the contention that defendant was not fully advised of the effects of his admission of the prior convictions and his being armed with concealed weapons at the time of the arrest, as required by In re Yurko, 10 Cal.3d 857. Yurko, supra, held, at page 864, that before a court can accept a defendant's admission of prior convictions, the accused is entitled to express and specific admonitions as to the constitutional rights (confrontation, jury trial and privileges against self-incrimination) waived by an admission and to be advised: "(2) of the precise increase in the term or terms

which might be imposed, if any, in the accused's case pursuant to section 644 or other applicable statutes (see, e.g., §§ 666, 667); and (3) of the effect of any increased term or terms of imprisonment on the accused's eligibility for parole."

The record indicates that although the jury found that defendant had used a firearm during the commission of the instant offenses, he was not sentenced on the use count (Pen. Code, § 12022.5), which would have added another five years to his sentence. As to the habitual criminal statute, the record indicates that the court initially refused to make a finding that defendant was not a habitual criminal. However, at the time of sentencing, the court clearly indicated defendant was not found to be a habitual criminal or sentenced pursuant to that statute. The record indicates that defendant was sentenced pursuant to former Penal Code section 3024, subdivision (b), which provided, so far as here pertinent, that the minimum term of sentence and imprisonment shall be four years "For a person previously convicted of a felony . . . and armed with . . . a concealed deadly weapon at the time of his arrest. . . ." (Emphasis added.) Although defendant was subsequently advised that his admission of prior felony convictions could increase the minimum term served to four years, it was not specifically pointed out to him that this increased minimum sentence mandated by Penal Code section 3024, subdivision (b) was the result of his admission of the priors and of his admission of being armed at the time of arrest.

Defendant complains that the record discloses that he was not advised as to: (1) his right to confront his accusers; and (2) the precise term which might have been imposed had he been adjudged a habitual criminal

pursuant to former Penal Code section 644; (3) the effect of his admissions on his eligibility for probation pursuant to Penal Code section 1203, subdivision (d) (4)9/ and section 1203.06, subdivisions (a) (2) and (b) (4)10/ (In re Yurko, supra, 10 Cal.3d, p. 862); (4) the fact that the prior convictions he was admitting could be used to impeach him if he chose to testify; and (5) prior to his admission that he was armed at the time of the arrest,11/ he should have been advised of the additional minimum four-year term of Penal Code section 3024, subdivision (b).

We need not discuss defendant's contentions in detail as, except for Penal Code section 1203.06, each of the above mentioned statutes either have been repealed or substantially modified by the Uniform Determinate Sentencing Act of 1976 (Stats. 1976, ch. 1139, effective July 1, 1977).12/

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9. This subdivision, so far as here pertinent, prohibited the granting of probation to a person twice previously convicted of a felony.

10. These subdivisions, so far as here pertinent, prohibit the granting of probation or suspension of a sentence for a person convicted of robbery who is convicted of a subsequent felony and knowingly carried a firearm as a means of offense or defense at the time of the arrest for the subsequent felony.

11. No evidence supports this admission. Rather, the evidence is to the contrary since three guns were found in the tote bag in the trunk.

12. Our discussion of the new act is based on the excellent overview of M. Oppenheim, 51 State Bar Journal 604 (Nov. - Dec. 1976).

Thus, on retrial, the admission of his priors and his admission that he was armed at the time of the arrest will be subject to the newly enacted provisions of Penal Code sections 667.5, 1170.1a, subdivision (a), and 1203.11.13/ The new statutes provide for general enhancements and repealed all of the specific enhancements inconsistent therewith. The Uniform Determinate Sentencing Act of 1976 provides for an enhancement of punishment for adults who have served a separate prison term for at least one year for a felony (Pen. Code, § 667.5), prevents the granting of probation to persons previously convicted of certain specified felonies, including robbery (Pen. Code, § 1203.11), and provides for the enhancement of sentences under specific circumstances, such as being armed with or using a deadly weapon (Pen. Code, § 1170.1a), a continuation of the current provisions of Penal Code sections 12022 and 12022.5. Thus, under the new statutes and the applicable Yurko rules (supra, 10 Cal.3d 857), defendant's admissions still involve "severe" sanctions applicable under numerous and complex circumstances that can be explained to an accused without imposing undue burden on the judicial process (Yurko, supra, p. 864).

We conclude that these multiple omissions indicate that defendant's waiver of his constitutional protections, revealed by the instant record, was not based on a full understanding of the adverse consequences of the admissions of his prior convictions and of being armed at the time of the arrest. (Boykin v. Alabama, 395 U.S. 238, 243;

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13. Penal Code section 1203.11 was added by Statutes of 1976, chapter 1135, and became effective on January 1, 1977, before the Uniform Determinate Sentencing Act of 1976, but after the judgment in the instant case.

In re Tahl, 1 Cal.3d 122, 130-133). Thus, the instant case requires only a limited new trial on the priors (People v. Fisk, 50 Cal.App.3d 364, 371).

The purported appeal from the sentence is dismissed. The judgment of conviction is affirmed. That part of the judgment declaring the existence of the prior felony convictions is reversed. The cause is remanded to the trial court, with directions to resentence defendant after a limited new trial on the priors following a finding that defendant's waiver was based on an understanding of all of the consequences of his admission of the priors, as well as the consequences of his admission of being armed at the time of his arrest.

CERTIFIED FOR PUBLICATION.

Taylor, P.J.

I CONCUR:

Rouse, J.

I concur in the judgment affirming defendant's conviction. The evidence of defendant's guilt was demonstrably overwhelming. There are two areas discussed in the main opinion, however, which call for some elaboration and which involve judicially declared rules of law which in my opinion are unsound, unnecessary and inimical to the fair administration of justice. Exercising my authority to criticize existing law (rule 976, Cal. Rules of Court), I proceed:

The first point involes the Rollo rule (People v. Rollo (1977) 20 Cal.3d 109) holding that it is error for a trial court to permit impeachment by an unidentified prior felony conviction. As pointed out by Justice Richardson in his dissent in Rollo, the Supreme Court beginning with its decision in People v. Beagle, 6 Cal.3d 441, has continued to dissolve the hertofore firmly accepted principle--now legislatively recognized in Evidence Code section 788--that a witness can be impeached by proof of conviction of a felony. The courts have--without any foundation--through purely gratuitous opinions converted a simple, workable rule into a breeding ground for frivolous appeals. For example, consider the bare assertion that a prior conviction for a crime of violence does not reflect upon the trait of credibility (People v. Rollo, supra, fn. 4, p. 120). Why doesn't it? Who says it doesn't? The basic, unrefuted theory for the rule that a prior conviction of any felony may affect the witness' credibility is simply a common sense conclusion that anyone who commits a felony, i.e., who breaches society's most serious penal statutes, is considered by society to be untrustworthy.

I agree with Justice Richardson that for all intents and purposes section

788 of the Evidence Code has been effectively erased by Beagle and its amorphous progeny. By judicially excluding prior felony conviction evidence, we are depriving our juries of an important tool which the citizens, through their elected representatives, have emphatically said that they want and need in order to properly perform their role as judges of the credibility of witnesses.

If the judicial branch is to achieve any credibility with the law-abiding segments of society, I suggest that it start with a re-examination of this unfortunate trend toward the obliteration of an explicit statute (Evid. Code, § 788) and its underlying sound basic principles of common sense.

And, in my opinion, the first step should be to return to the pre-Beagle rule that evidence of any prior felony conviction is unqualifiedly admissible for impeachment purposes. Arguments that a particular type of felony does nor does not bear on one's credibility are peculiarly matters of weight to be resolved by the trier of fact.

The second point I wish to address concerns the burden placed upon the trial judge under In re Yurko, 10 Cal.3d 857, which requires that in addition to the admonition of the constitutional rights, i.e., confrontation, jury trial, and privileges against self-incrimination, the judge advise the defendant "(2) of the precise increase in the term or terms which might be imposed, if any, in the accused's case pursuant to section 644 or other applicable statutes (see, e.g., §§ 666, 667); and (3) of the effect of any increased term or terms of imprisonment on the accused's eligibility for parole." (In re Yurko, supra, at p. 864.)

This requires the judge to make computations based on factors which are not always readily discernible at the time of trial. An element of clairvoyance thus becomes a necessary ingredient in the process; yet I am unaware of any competent judge who is so endowed. And, of course, any error in advising the defendant of the "precise increase" vitiates the admission of the prior, requiring reversal. In my opinion, due process in the context of advice as to the effect of admitting priors would be fully satisfied by simply advising the defendant that such an admission can provide a basis for an increased term of imprisonment and/or parole. Period!

In the case at bench, the record is abundantly clear that appellant was advised that by admitting the five charged priors his minimum term would be increased to four years under Penal Code section 3024, subdivision (b), which required the combination of prior felony conviction and being armed with a deadly weapon either at the time of the offense or being armed with a concealed deadly weapon at the time of arrest. Appellant's contention that he was not advised of the effect of his admission that he was armed with a concealed deadly weapon at the time of his arrest is technically correct. In the context of the entire voir dire regarding the enhancement of the minimum term, however, it is obvious that the arming admission was part and parcel of the mechanism which activated section 3024. Appellant cannot possibly claim any prejudice by reason of the inarticulateness of his own counsel's voir dire, since appellant acknowledged and accepted the potential of an increase to the four-year minimum which was precisely what the arming admission plus priors provided for (§ 3024, subd. (b)).

The record does fail to show that appellant was advised that he could be impeached by the priors if he elected to testify. But appellant cites no authority that such advice is required. On the contrary, the theory of Yurko is that advice and waiver are required as to consequences in terms of increased penalty (In re Yurko, supra, 10 Cal.3d at p. 864). Clearly, impeachment presents no such potential. I therefore would reject this contention of Yurko error.

Likewise, the lack of admonition concerning the possible application of the Habitual Criminal Law is without merit, since the court did not sentence appellant as an habitual criminal.

However, I agree that remand is necessary in this case because (although not discussed by the parties) the record fails to show that the trial court made any finding that the admissions and waivers by appellant were knowing and intelligent (In re Yurko, supra, 10 Cal.3d at p. 865). I observe in closing, however, that the preferred practice in taking guilty pleas or admissions of prior convictions or waiver of constitutional rights is for the trial judge to conduct the voir dire personally. We have observed in this and other cases that where the inquiry is delegated to counsel the margin for error increases demonstrably.

Kane, J.

[Filed May 17, 1978]

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

1 CRIM. NO. 15834

(Sup.Ct.No. 61376)

PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff and Respondent,
v.
PAUL MICHAEL MINJARES,
Defendant and Appellant.

THE COURT:

On his petition for rehearing, defendant argues that the People conceded at oral argument that the People v. Rollo (20 Cal.3d 109) error here was per se reversible. There is no transcript of the argument. However, the People's brief contended that a Rollo error would not be reversible per se, but would be subject to the rule enunciated in People v. Watson, 46 Cal.2d 818, 836. If the concession was made at oral argument, it was clearly

erroneous and this Court is not bound by such concession in rendering its opinion.

The petition for rehearing is denied.

Dated: May 17, 1978.

Taylor, P.J.
Presiding Justice

APPENDIX D

No. 20549

IN THE SUPREME COURT OF THE STATE
STATE OF CALIFORNIA

IN BANK

PEOPLE

v.

MINJARES

Request for an order staying issuance of the remittitur is denied. Appellant's motion for release from custody is denied.

SUPREME COURT

FILED

June 27, 1979

G. E. Bishel, Clerk

Deputy

BIRD
Chief Justice